85-142

No.

Office-Supreme Court, U.S.
FILED
JUL 26 1985
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1984

RICHARD KASVIN, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

PATRICK A. TUITE
DAVID S. MEJIA
The Law Offices of
PATRICK A. TUITE, LTD.
Suite 900
19 South LaSalle Street
Chicago, Illinois 60603
(312) 641-1022
Attorneys for Petitioner

CHAS. P. YOUNG CHICAGO

QUESTIONS PRESENTED FOR REVIEW

May a citizen, consistent with due process and double jeopardy consideration be convicted of the offense of conspiracy as an aider and abettor of a conspiracy by being a purchaser of marijuana from a drug distribution ring after the trial court found at the close of the government's case that the defendant was not a member of the conspiracy to distribute marijuana?

May the Court of Appeals consistent with the prohibition against double jeopardy conduct a *de novo* determination that the defendant was a member of a conspiracy after the trial found he was not?

TABLE OF CONTENTS

	PAGE
Table of Authorities	iii-iv
Questions Presented For Review	i
Introduction	1
Opinion Below	1-2
Statement of Jurisdiction	2-3
Statutory Provisions Involved	3
Statement of the Case	4
Introduction	4
Summary of Evidence	4-6
Reasons Why Certiorari Should Be Granted	6
Argument	
A	7-12
B	12-15
C	15-16
D	16-19
Conclusion	19

TABLE OF AUTHORITIES

PAGE

Direct Sales Co. v. *United States*, 319 U.S. 703 (1943) .. 9, 10
Ex Parte Bain, 121 U.S. 1 (1887) 13
Gebardi v. *United States*, 287 U.S. 112 (1932) 11
May v. *United States*, 175 F.2d 994 (D.C. Cir.), *cert. denied* 338 U.S. 830 (1949)..... 11
Nye & Nisser Corp. v. *United States*, 336 U.S. 613 (1949) 7
People v. *Strauch*, 240 Ill. 60, 88 N.E. 155 (1909) 9
Pinkerton v. *United States*, 328 U.S. 640 (1946) 7, 11, 18
Schooner v. *United States*, 11 U.S. 389 (1813)..... 14
Stirone v. *United States*, 361 U.S. 212 (1960) 13
Turbyfill v. *United States*, 454 U.S. 828 (1981) 15
United States v. *Beck*, 615 F.2d 441 (7th Cir. 1980) ... 7
United States v. *Bowman*, 636 F.2d 1003 (5th Cir. 1981) 15
United States v. *Britton*, 108 U.S. 199 (1983) 8
United States v. *Campbell*, 426 F.2d 547 (2d Cir. 1970). 7
United States v. *Carter*, 720 F.2d 941 (7th Cir. 1983) .. 18
United States v. *Ember*, 726 F.2d 522 (9th Cir. 1984).. 15
United States v. *Ewbank*, 483 F.2d 1149 (9th Cir. 1983) 17
United States v. *Falcone*, 311 U.S. 205 (1940) 9
United States v. *Farrar*, 38 F.2d 515 (D.Mass.) *aff'd*, 281 U.S. 624 (1930) 11
United States v. *Ford*, 324 F.2d 950 (7th Cir. 1963) ... 12
United States v. *Galiffa*, 734 F.2d 306 (7th Cir. 1984).. 18
United States v. *Gallagher*, 565 F.2d 981 (7th Cir. 1977) 11
United States v. *Groff*, 643 F.2d 396 (6th Cir.) *cert. denied sub nom*..... 15
United States v. *Hess*, 691 F.2d 1205 (1st Cir.) *cert. denied*, 446 U.S. 940 (1980)..... 12
United States v. *Huckaby*, 698 F.2d 915 (8th Cir. 1982) *cert. denied*, 460 U.S. 1070 (1983) 17

PAGE

United States v. *Hyman*, 741 F.2d 906 (7th Cir. 1984). 12

United States v. *Izzi*, 613 F.2d 1205 (1st Cir.) *cert. denied*, 446 U.S. 940 (1980) 12

United States v. *Jones*, 647 F.2d 696 (6th Cir. 1981) .. 13

United States v. *Keith*, 605 F.2d 462 (9th Cir. 1979) .. 14

United States v. *Koch*, 113 F.2d 982 (2d Cir. 1940) 12

United States v. *Krol*, 374 F.2d 776 (7th Cir. 1967) ... 8

United States v. *Levy*, 741 F.2d 915 (7th Cir.) *cert. denied*, 105 S.Ct. 440 (1984) 17

United States v. *Miller*, 37 Cr. Law. Rptr. 3501 (April 1, 1985) 13

United States v. *Nasser*, 476 F.2d 1111 (7th Cir. 1973). 11

United States v. *Norris*, 281 U.S. 619 (1930) 13

United States v. *Peoni*, 100 F.2d 401 (2d Cir. 1938) ... 7

United States v. *Perry*, 643 F.2d 38 (2d Cir. 1981) 9

United States v. *Price*, 617 F.2d 455 (7th Cir. 1979) ... 17

United States v. *Samuels*, 741 F.2d 570 (4th Cir. 1984). 12

United States v. *Scott*, 437 U.S. 82 (1978) 15

United States v. *Strawser*, 739 F.2d 1226 (7th Cir. 1984) 17

United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 8

United States v. *Varelli*, 407 F.2d 735 (7th Cir. 1969) .. 11, 12, 19

United States v. *Vera*, 701 F.2d 1349 (11th Cir. 1983) .. 8

United States v. *Watson*, 594 F.2d 1330 (10th Cir.) *cert. denied*, 444 U.S. 866 (1979) 12

United States v. *Widgery*, 674 F.2d 710 (8th Cir.) *cert. denied*, 459 U.S. 894 (1982) 18

United States v. *Wilkins*, 659 F.2d 769 (7th Cir.) *cert. denied*, 454 U.S. 1102 (1981) 17

Statutes

18 U.S.C. § 2 3

21 U.S.C. § 841 3

21 U.S.C. § 846 3

In The

Supreme Court of the United States

October Term, 1984

No.

RICHARD KASVIN, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

INTRODUCTION

TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

May it please the Court:

Richard Kasvin respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit:

Opinion Below

The March 13, 1985 opinion of the United States Seventh Circuit Court of Appeals (jurisdiction conferred by 28 U.S.C. § 1291), affirming petitioner's marijuana distribution conspiracy conviction and five year prison sentence and $15,000 fine (21 U.S.C. § 841(a)(1) in the United States District Court, Northern District of Illinois, Eastern Division (82 CR 255) is appended hereto as Appendix A. The May 14, 1985 order

denying petitioner's rehearing petition with suggestion for rehearing *en banc* is appended hereto as Appendix B.

Statement of Jurisdiction

This petition is untimely (Rev. Rules of the Supreme Court of the United States, Rule 20) having been filed approximately 10 days after its July 15, 1985 due date. Exceptionally compelling and mitigating reasons exist for its lateness. Petitioner's privately retained trial and appellate defense counsel Messrs. David S. Mejia and Patrick A. Tuite have been, since May 20, 1985, continuously on trial to July 15, 1985 in an eight-week jury trial *United States* v. *Circuit Court Judge Richard F. LeFevour*, (85 CR 837) in the United States District Court in Chicago, Illinois. The original *LeFevour* indictment involved a 72 Count Racketeering, Bribery—Official Misconduct Conspiracy, Mail Fraud, False Statements and False Income Tax Returns prosecution of a high-ranking state court judge (publicly called the Operation Greylord Undercover Investigation of corruption in the Cook County Court System). The trial involved over 150 witnesses including tax experts; federal, state and county law enforcement officers and employees; lawyers; judges; and thousands of documents, charts, graphs, maps, summaries, photographs as well as Title III tape recordings and transcripts as evidence. The case was not only of great length; it was of great factual and legal complexity.

In the entire 60 day period (May 15, 1985 to July 15, 1985) for the filing of petitioner's writ of certiorari, Richard Kasvin's attorneys were either continuously on trial on a daily basis or in between court sessions preparing over 150 cross-examinations of prosecution witnesses, reviewing thousand of documents, preparing the two-week defense case, and drafting instructions of law for the court and jury.

The present certiorari petition is not frivolous nor filed for purposes of delay. The dissenting opinion of Seventh Circuit Senior Judge Luther M. Swygert demonstrates that peti-

tioner's conviction may very well be constitutionally infirm. Accordingly, petitioner prays that this petition for writ of certiorari be fully considered and accepted *instanter*. (Rev. Rules of the Supreme Court of the United States, Rule 29).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2. Principals

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

21 U.S.C. § 841. Prohibited acts A

Unlawful Acts

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . .

21 U.S.C. § 846. Attempt and conspiracy

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Introduction

The indictment charged eight persons, including Mr. Kasvin, with conspiracy under 28 U.S.C. § 846 to distribute marijuana and to possess marijuana with intent to distribute (Count 1). Counts 2 and 3 did not charge Mr. Kasvin. Count 4 charged six persons, including Kasvin, with possession of marijuana with intent to distribute on or about April 9, 1982. (28 U.S.C. 841(a)(1))

Mr. Kasvin and Mr. Galiffa were the only two defendants to go to trial.

At the close of the government's case, the court directed a verdict of acquittal for Kasvin on Count 4, the possession charge. The Court stated on numerous occasions during the trial that the government had failed to prove that Mr. Kasvin was a member of the conspiracy charged in Count 1. (324-25, 548)* Nonetheless, the court *sua sponte* suggested that Kasvin was an aider and abettor of the conspiracy (334,548) and allowed Count 1 to go to the jury against Mr. Kasvin on aiding and abetting instructions. The Court specifically stated that its options were to give an aiding and abetting instruction or to direct a verdict of acquittal in Kasvin's favor on Count 1. (535, 548) The court denied motions for judgment of acquittal on Count 1 and chose to give an aiding and abetting instruction. Mr. Kasvin was convicted on Count 1 and sentenced to five years' imprisonment and a fine of $15,000.

Summary of Evidence

Leroy Schubert and Stuart Ashenfelter were the principals in an interstate marijuana distribution conspiracy. One of their six workers, Rechterman, testified that a man named Smith or Smyth was one of the conspiracy's better customers (99-100), but was not a member of the Schubert-Ashenfelter organization. (114, 132) Rechterman identified

---

*References are to trial transcript pages.

Kasvin as the man he knew as Smith. (101) Rechterman could remember no specific date when Kasvin purchased marijuana. (119) Although Rechterman was shown various pieces of paper purporting to be receipts of marijuana sales, he could not identify any of them as a receipt for marijuana sold to Kasvin. (136) Nor was Rechterman able to identify any papers as receipts given to Kasvin for payments made by Kasvin (124) At the time of these transactions, Rechterman was heavily using cocaine. (127)

Stuart Ashenfelter, charged in the indictment and having entered a plea agreement, testified that Mr. Kasvin was a frequent customer of his organization (295), but could not remember any specific sales to Kasvin. (392) Many sales by Ashenfelter's group, including those to Kasvin, were made on a credit basis. (301) Ashenfelter stated that Kasvin was not a member of his organization, only a customer. (440) Ashenfelter testified at length about papers seized from his Ingleside, Illinois house. Although the papers did not appear on their face to be receipts for marijuana sold to Kasvin, although Ashenfelter was not able to state that they showed specific sales to Kasvin, and although Ashenfelter stated the papers were not reliable, these papers were admitted into evidence under Federal Rule of Evidence 803(6) and 803(24).

The government's last witness, a law enforcement agent, offered the opinion that these papers reflected numerous sales of marijuana to a customer "Number 5," who was the single largest customer of the group (465), and that receipts bearing the number "5" variously showed the names "Smith" and "dog" and the initials "RK." Although the witness did not say that Richard Kasvin was customer "Number 5," that was clearly the government's theory at trial and the inference it sought to establish, notwithstanding Ashenfelter's testimony that he did not remember Kasvin's number and thought it was "4." (310)

The supervisor of surveillance agents testified that, for ten to twelve weeks before the day of the defendants' arrest at

Ashenfelter's house in Ingleside, agents had been watching this house, where the sales took place (51), and had never seen Kasvin's automobile or Kasvin's license tag. (53) When the defendants were arrested at Ashenfelter's house, the agents discovered the 234 pounds of marijuana that formed the basis of Count 4.

REASONS WHY CERTIORARI SHOULD BE GRANTED

After determinations of fact and rulings of law were entered for defendant, finding at the close of the prosecution's case that he did not possess marijuana with the intent to distribute and that he was not proven to be a member of the self-same marijuana distribution conspiracy, an extraordinarily anomolous result came about: judgment of acquittal was ordered on the substantive marijuana possession count while the jury was instructed *sua sponte* on an aiding and abetting theory. Thereafter, the defendant was convicted of the offense "aiding and abetting a conspiracy."

On appeal, the Seventh Circuit went beyond the scope of proper appellate power and affirmed the conspiracy conviction upon its *de novo* determination that defendant was a member of the conspiracy despite the trial court having explicitly ruled he was not. This decision, if allowed to stand, is so substantial in its precedential impact that it compels plenary considerations by the Supreme Court.

The Seventh Circuit's further erroneous application of the theory of aiding and abetting a conspiracy transforms aiding and abetting into a catch-all offense, stands in direct conflict with established precedent in numerous circuits on the "Buyer-Seller" principle, and as aiding and abetting is applied to this case the court's instructions impermissibly amend the indictment thereby depriving petitioner of fair notice of the charges as well as denying him the constitutional right to indictment by a grand jury.

ARGUMENT

A.

Once the Court Found That Kasvin Was Not A Member of The Charged Conspiracy, There Was No Evidentiary Basis to Charge on a Theory That He Aided and Abetted the Conspiracy.

To aid and abet a crime, the defendant must do two things: (1) knowingly associate with the criminal venture; and (2) knowingly participate in some overt act to further the success of the venture. *United States* v. *Beck*, 615 F.2d 441, 448-49 (7th Cir. 1980). The association required for aiding and abetting "does not rise to the level of agreement." *Id.* at 449. The defendant must "in some sort associate himself with the venture, . . . participate in it as in something he wishes to bring about, (and) . . . seek by his action to make it succeed." *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, J.). See also *Nye & Nissen Corp.* v. *United States*, 336 U.S. 613 (1949). Aiding and abetting is not a crime, but a theory for finding a defendant equally culpable with others who directly and actually commit he crime. *United States* v. *Campbell*, 426 F.2d 547, 553 (2d Cir. 1970). Thus, one who aids and abets a crime must have a knowledge and intent that is appropriate to the specific crime involved.

Conspiracy, by contrast, is both a crime in its own right and a theory of complicity that makes a defendant equally culpable with actors who directly and actually commit crimes other than the crime of conspiracy. When the aims of the conspiracy are unrealized, the conspirators are guilty of the crime of conspiracy. When the conspiracy bears fruit, that is, when crimes other than the crime of conspiracy are committed, conspirators are guilty of the crimes in furtherance of the conspiracy as well as guilty of the conspiracy itself, and may receive separate, consecutive sentences for the conspiracy and for the choate crimes committed in furtherance of the conspiracy. *Pinkerton* v. *United States*, 328 U.S. 640 (1946). Conspiracy requires an *agreement*, knowingly and intentionally entered into by the conspirators, to

achieve unlawful ends. In drug conspiracies, under 21 U.S.C. Sec. 846, no conspirator is required to perform an overt act. *United States* v. *Vera*, 701 F.2d 1349, 1357 (11th Cir. 1983). Section 846 punishes "pure agreements." The crime is agreement, and nothing more.

Once agreement is formed the parties cannot withdraw from the agreement and defeat liability for the crime of agreement. *United States* v. *Britton*, 108 U.S. 199 (1983). Under rigorous and limited conditions, *United States Gypsum Co.*, 438 U.S. 422, 462-465 (1978), conspirators may, however, "withdraw," in the sense that they avoid liability for choate crimes committed in furtherance of the agreement, even though they are nonetheless liable for the crime of conspiracy. W. LaFave & A. Scott, *Handbook on Criminal Law*, Sec 62, at 486 & n.176 (1972).

That the crime of conspiracy is conceptually distinct from aiding and abetting choate crimes in furtherance of a conspiracy is amply demonstrated by the cases permitting a jury to convict of conspiracy and acquit of substantive offenses, or vice versa. These decisions do not rely on the jury's historic power to render inconsistent verdict; instead, these cases explicitly declare that conspiracy is analytically different from aiding and abetting liability. *E.g. United States* v. *Krol*, 374 F.2d 776, 778 (7th Cir. 1967).

It follows from the foregoing principles that aiding and abetting choate offenses that are committed in furtherance of an already formed conspiracy does not make one an aider and abettor of the conspiracy. Once the agreement is formed, the parties to the agreement cannot withdraw from the agreement in an effort to absolve themselves from a crime already committed, and so there is nothing to aid and abet, at least as far as the crime of conspiracy is concerned. An aider and abettor who comes along after the act of agreeement can only aid the choate offenses. As to the conspiracy itself, he or she can join that conspiracy as a member, but arrives too late to aid and abet an act of agreement already made. Such is the case here.

People v. *Strauch*, 240 Ill. 60, 88 N.E. 155 (1909), illustrates that narrow scope of aiding and abetting a conspiracy. Strauch aided and abetted a conspiracy because, even though he himself did not enter the agreement, he introduced two persons to each other within the intention that those two would come to a criminal agreement. *Strauch* can be expanded to comprehend situations in which a defendant brings new candidates to an already existing conspiracy. *Strauch* might be further expanded to situations in which an actor promises to supply others with the tools of the crime if only they will agree. But responsibility for aiding and abetting a conspiracy does not extend beyond these limits. Developments in the law, *Criminal Conspiracy,* 72 Harv.L.Rev. 920, 934-35 (1959). See also *United States* v. *Perry*, 643 F.2d 38, 47 (2d Cir. 1981), which expressed doubt that one could *ever* aid and abet a conspiracy.

No case of this Court has held that one may aid and abet the crime of conspiracy. Nothing in *United States* v. *Falcone*, 311 U.S. 205 (1940), should be taken to suggest that aiding a conspiracy's choate crimes makes one an aider of a conspiracy already formed. In *Falcone*, the defendants supplied sugar and other items to various "moonshiners." The Second Circuit, 109 F.2d 579, speaking through Judge Learned Hand, held their knowledge of the use to which these materials would be put was insufficient to make them members of a conspiracy and aiders and abettors of the crime of conspiracy. On review, this Court did not address the broad legal principle whether one may aid and abet the crime of conspiracy when that crime has been committed before the defendant's alleged aiding and abetting. Instead, this Court ruled that there was insufficient evidence to show defendants had knowledge of an existent conspiracy, and hence this Court had no need to resolve the broader issue.

A few years later in *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943), this Court again did not reach this broader issue, for it found evidence that the defendant had become a member of the conspiracy. This Court did, however, suggest

in dictum that one might aid and abet a "conspiracy" so long as one knows of its existence. It is unclear whether this Court was referring to "conspiracy," the crime of agreement, or to "conspiracy," the group that commits choate crimes. Under this latter meaning, the dictum suggests that the actor would be a conspirator or treated as a conspirator because he or she aided the choate crimes.

The dictum in *Direct Sales*, if taken in this latter sense, is misleading. If the suppliers know of the conspiracy, their act of supplying could aid choate offenses committed in furtherance of the conspiracy. But one wonders how the suppliers could aid the formation of an agreement that had already been formed and from which the conspirator could not withdraw in an effort to absolve themselves of guilt for the crime of conspiracy.

On the facts of the case at bar, there was no basis for giving an aiding and abetting instruction. The court found that Mr. Kasvin was not a member of the conspiracy. Taking all evidence in the light most favorable to the government, it appears that Mr. Kasvin bought quantities of marijuana from the conspirators. There is not a single piece of evidence that his buying marijuana or any other act added a single conspirator to the group. Nothing in the record demonstrates that Kasvin's purchases of marijuana caused the formation of a conspiracy, or the addition of new conspirators to an agreement that was already formed.

Even if one reads *Direct Sales* for the proposition that one aids and abets a conspiracy by aiding and abetting substantive crimes committed by the conspirators, it is clear that Mr. Kasvin did not aid and abet substantive crime in this case. The conspirators claimed to have distributed marijuana to Kasvin. No witness testified to any act performed by Kasvin other than buying marijuana. It was a crime for the conspirators to distribute marijuana to Kasvin. If, having received the marijuana, Kasvin possessed it with intent to distribute, Kasvin would be guilty of a separate crime. But

his guilty possession cannot be an aiding and abetting of a transfer that already took place.*

Section 841 of Title 21 criminalizes distribution of marijuana and it punishes possession with intent to distribute. It punishes the distributor. It punishes the distributee not for the act of receiving, but for the act of possession with intent to distribute. This legislation is analogous to the Mann Act, 18 U.S.C. Sec. 2421, which punishes the person who takes a woman across state lines for an immoral purpose, but does not punish the woman even where she willingly travels for immoral purposes. *Gebardi* v. *United States*, 287 U.S. 112 (1932). It is also analogous to prohibition era legislation that punishes the seller of alcoholic beverages, but not the buyer. *United States* v. *Farrar*, 38 F.2d 515 (D.Mass.), *aff'd*, 281 U.S. 624, 634 (1930). The separate and singular criminal act of possessing with intent to distribute cannot be reformulated as an aiding and abetting of the prior crime of distribution. *Gebardi* v. *United States*, 287 U.S. 112, 119, 123 (1932); *United States* v. *Gallagher*, 565 F.2d 981 (7th Cir. 1977); *United States* v. *Varelli*, 407 F.2d 735, 748-49 (7th Cir. 1969); *United States* v. *Nasser*, 476 F.2d 1111, 1120 (7th Cir. 1973); *May* v. *United States*, 175 F.2d 994, 1011 (D.C. Cir.), *cert. denied*, 338 U.S. 830 (1949).

When the court determined as a matter of law that Richard Kasvin was not guilty of possession of marijuana with intent to distribute (Count 4) and that Mr. Kasvin was not a member of the conspiracy, there was no other basis to submit Count 1 to the jury, and Kasvin should have been discharged. Richard Kasvin did nothing to aid the act of agreement or to add members to an already existing agreement. Under the indictment and by the proof at trial, his

---

*Count 4 was the only substantive count to allege Kasvin's criminal possession with intent to distribute, but the court found this charge unsupported as a matter of law. If Kasvin were truly guilty of conspiracy, he would also be guilty of Count 4 under *Pinkerton* v. *United States*, 328 U.S. 640 (1946), which makes a conspirator guilty of choate offenses committed in furtherance of the conspiracy.

alleged acts of receiving marijuana could not be reformulated as an aiding of the conspirators' act of distribution.

Finally, by making a buyer an aider, and thus a conspirator, the Seventh Circuit's decision ignores and conflicts with the "Buyer-Seller Rule." The Seventh Circuit has recognized for over two decades that a mere buyer cannot be a conspirator. *See e.g., United States* v. *Hyman*, 741 F.2d 906 (7th Cir. 1984); *United States* v. *Varelli*, 407 F.2d at 748; *United States* v. *Ford*, 324 F.2d 970 (7th Cir. 1963). Every other circuit that has addressed the buyer-seller issue has reached the same result. *See, e.g. United States* v. *Samuels*, 741 F.2d 570 (4th Cir. 1984); *United States* v. *Hess*, 691 F.2d 984 (11th Cir. 1982); *United States* v. *Izzi*, 613 F.2d 1205 (1st Cir.), *cert. denied*, 446 U.S. 940 (1980); *United States* v. *Watson*, 594 F.2d 1330 (10th Cir.), *cert. denied*, 444 U.S. 866 (1979); *United States* v. *Koch*, 113 F.2d 982 (2d Cir. 1940). Accordingly, if allowed to stand the present decision has discarded a heretofore unquestioned defense to conspiracy. The law of conspiracy should not be so broadly, yet implicitly enlarged.

B.

The Aiding and Abetting Instructions Impermissibly Amended the Indictment and Deprived Mr Kasvin of Fair Notice of the Charges As Well As Denied Him The Constitutional Right to Indictment by a Grand Jury.

Even if it can be theoretically said that the evidence supported a jury instruction on aiding and abetting, the indictment did not give fair notice of that crime. To convict Mr. Kasvin of a charge not fairly presented in the indictment denied him due process and the right to be indicted by a grand jury. The indictment (Count 1) charged Mr. Kasvin with joining a conspiracy and being a member of a conspiracy; it further charged him, along with the conspirators, with possession (Count 4). The trial court found and ruled as a matter of law that there was no proof of these charges. At

the very end of the case, after several trial days and after both sides rested, when the Court submitted the case to the jury on a theory of aiding and abetting, it invited conviction for an offense completely different from that set out in the indictment. The court's charge effectively and impermissibly amended the indictment.

The Fifth Amendment to the Constitution grants the accused the right to indictment by grand jury. For this reason, an indictment, once returned, cannot be amended, save to correct errors of form. *Stirone* v. *United States*, 361 U.S. 212 (1960); *United States* v. *Norris*, 281 U.S. 619 (1930); *Ex parte Bain*, 121 U.S. 1 (1887). Impermissible amendments occur not only when the text of the indictment itself is redrawn, but also when the court's charge allows the jurors to convict on a basis other than that alleged in the indictment. *United States* v. *Miller*, 37 Cr. Law Rptr. 3501 (April 1, 1985); *United States* v. *Jones*, 647 F.2d 696 (6th Cir. 1981); 1 C. Wright, *Federal Practice and Procedure* § 127, at 418 & n.7 (2d ed. 1982).

In the case at bar, the court allowed the jurors to convict Mr. Kasvin for aiding and abetting a conspiracy even though he was not a member of the conspiracy and was innocent of the sole substantive charge brought against him. The indictment charged agreement by Kasvin. Yet the court permitted conviction upon broader proof of Kasvin's *association* with uncharged and uncertain acts in furtherance of someone else's agreement. If interference with the interstate transport of steel is legally different from interference with the interstate transport of sand and implicates the Fifth Amendment to the Constitution, *Stirone* v. *United Sates*, 361 U.S. 212 (1960), then surely an agreement to commit crimes is, for Fifth Amendment purposes, different from knowingly aiding in the commission of crimes when the aid does not amount to agreement.

It blinks reality and makes a mockery of the requirement of indictment by grand jury to say that the grand jurors

considered and approved the charge submitted by the court to the trial jurors.

> To allow a prosecutor or court to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection that the grand jury was designed to secure, because a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him.

United States v. *Keith*, 605 F.2d 462, 464, (9th Cir. 1979).

The gulf between the indictment and the court's instructions is even wider when one considers the theory of aiding and abetting employed in this case. In the Seventh Circuit's view, Kasvin aided distributions by being a distributee. As earlier demonstrated this theory was an incorrect application of legal doctrine; but, if the theory is sustainable in principle, it is nowhere fairly implied in the charge that Kasvin was a member of a conspiracy. Richard Kasvin has been convicted of conspiracy even though he made no agreement nor facilitated anyone else's agreement. His conviction for conspiracy results from aiding uncharged crimes that required no agreement and as to which he did not agree. Our jurisprudence has always been wary of a conviction for an offense other than the one charged in the indictment.

> The rule that a man shall not be charged of one crime and convicted of another, may some times cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded should state the crime which is to be proved, and state such crime as will justify the judgment to be pronounced.

Schooner v. *United States*, 11 U.S. 389, 394 (1813).

Mr. Kasvin's conviction rests on uncharged purchases of marijuana of which the witnesses had no clear, specific recollection. The government could not prove the charges leveled against Mr. Kasvin by the grand jury. But it could produce witnesses who made vague accusations of wrongdoing that was marijuana-related in some manner. Kasvin's conviction rests on those accusations, which were substituted at the last minute for the accusations made by the grand jury and for which he was granted a directed acquittal.

C.

By Effectively Reversing the Trial Court's Decision In Favor of Mr. Kasvin, the Court of Appeals Decided An Issue Not Raised by Either Party and Violated Mr. Kasvin's Right Against Double Jeopardy and His Right to Due Process.

Appellate courts do not consider issues not raised on appeal. *See United States* v. *Bowman*, 636 F.2d 1003 (5th Cir. 1981). This is especially true where the issue pertains to a count of which the defendant was acquitted. *United States* v. *Groff*, 643 F.2d 396 (6th Cir.), *cert. denied sub nom. Turbyfill* v. *United States*, 454 U.S. 828 (1981). Indeed, the double jeopardy clause of the Fifth Amendment absolutely bars a government appeal of a judgment of acquittal where acquittal is based on the trial court's ruling that the evidence was insufficient. *See United States* v. *Scott*, 437 U.S. 82, 91 (1978). This is so "even if the judgment of acquittal was entered for erroneous reasons." *United States* v. *Ember*, 726 F.2d 522, 524 (9th Cir. 1984).

In the instant case, the trial court acquitted Mr. Kasvin because the evidence affirmatively established he was not part of the conspiracy. Despite the government's concession in the court of appeals that Mr. Kasvin's membership in the conspiracy was not an issue on appeal, Government's Brief at 2 n.4, the Seventh Circuit held that Mr. Kasvin's conviction could be affirmed because of its review of the evidence placed

him in the conspiracy. *See* Slip op. at 8-9, 11. In so doing, the Court affectively subjected Mr. Kasvin to double jeopardy. He must not only persuade the trial court that he is not a member of the conspiracy, he also must convince a second fact-finder—the Seventh Circuit. Moreover, as Judge Swygert noted, the Court's decision amounts to directing a verdict in favor of the government without permitting Mr. Kasvin to contest the renewed argument that he is a member of the conspiracy. *See* Slip op. at 27.

Judge Swygert also stressed that this Court's decision is essentially a harmless error means of supporting its decision. *See id.* at 28. The Court of Appeals implicitly held that, even if Mr. Kasvin is not an aider and abettor, his conviction can be affirmed because the appellate court believed that the evidence showed him to be a principal. A harmless error approach is permissible where an alternate basis for a conviction was proven beyond a reasonable doubt at trial.

D.

The Court of Appeals May Not Properly Base Its Affirmance on its *De Novo* Determination that Mr. Kasvin Was a Member of the Conspiracy Where the Trial Court Explicitly Ruled that Mr. Kasvin Was Not a Member of the Conspiracy.

As Judge Luther Swygert stressed in his dissent to the Seventh Circuit's decision, the trial court explicitly ruled that Mr. Kasvin was not a member of the conspiracy. The plainest example is the following exchange:

[Prosecutor]: Correct. That is our argument, that he [Mr. Kasvin] is a member of the conspiracy.

[Trial Court]: I have, in effect, ruled against you on that.

Tr. 503. The procedural history of this case is that the government fully conceded the trial court's ruling at trial, at sentencing, and on appeal. This Court, however, *sua sponte* conducted its own review of the evidence and affirmed Mr.

Kasvin's conspiracy conviction finding Richard Kasvin to be a member of the conspiracy. *See* Slip op. at 5 n.2, 8 & n.3, 9 (appended hereto). In basing its decision on its review of evidence that the trial court resolved in Mr. Kasvin's favor, the court of appeals ignored fundamental tenets limiting the scope of appellate review, violated Mr. Kasvin's Fifth Amendment right, and engaged in unprecedented appellate decision-making.

It is a truism that an appellate court must give great deference to the findings of the trial court, *see United States* v. *Levy*, 741 F.2d 915 (7th Cir.), *cert. denied*, 105 S.Ct. 440 (1984), particularly where the trial court has made findings of fact upon which rulings of law are based. *See United States* v. *Strawser*, 739 F.2d 1226, 1229 (7th Cir. 1984). The trial court's resolution of factual questions, in a case of this kind, must be accepted. *United States* v. *Wilkins*, 659 F.2d 769 (7th Cir.), *cert. denied*, 454 U.S. 1102 (1981). This great deference to the trial court is based on the sound presumption that the trial court correctly decided the issues before it. *See United States* v. *Price*, 617 F.2d 455, 460 (7th Cir. 1979) ("We will not . . . presume the wrong reasons, when the correct ones [supporting the trial court's decision] are apparent"); *United States* v. *Ewbank*, 483 F.2d 1149 (9th Cir. 1983) (court of appeals may presume that trial court applied the proper standard of law). A correllary presumption is that the court of appeals always must view the evidence in the light most favorable to the verdict rendered. *See United States* v. *Huckaby*, 698 F.2d 915 (8th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983).

Instead of giving deference, the court of appeals sought to presume error. It gave no deference to the trial judges' rulings, indulged in no presumption of the correctness of those rulings, and viewed the evidence relating to Count 4, of which Mr. Kasvin was acquitted, in the light most favorable to the government. The trial court clearly, specifically, definitely ruled that there was insufficient evidence to establish that Mr. Kasvin was a member of the conspiratorial organization and, on that ground, the trial court acquitted him of

Count 4, possession with intent to distribute. (503). Moreover, with equal certainty, the trial court ruled that, except for the aiding and abetting theory the court would have acquitted Mr. Kasvin on the conspiracy count because Mr. Kasvin was not a co-conspirator. (535,548) Despite the trial judge's superior opportunity to examine the evidence and weigh the witnesses' credibility, the court of review determined on its own that the evidence was not what the trial court found it to be. While the trial court found as a matter of law Richard Kasvin was not a co-conspirator, the appellate court held he was. This ignores all presumptions and deference normally accorded a trial court and improperly makes the court of appeals a fact-finder. *Accord United States* v. *Carter*, 720 F.2d 941 (7th Cir. 1983) (it is not the prerogative of the court of appeals to retry a case or weigh the evidence); *United States* v. *Widgery*, 674 F.2d 710, 713 (8th Cir.), *cert. denied*, 459 U.S. 894 (1982) ("An appellate court does not sit as a *de novo* fact-finder"). Particularly where Court is weighing, *de novo*, evidence on which the trial court found for the defendant, the reviewing Court has drastically exceeded its role as an appellate body.

Finally, that the trial court held that Mr. Kasvin was not a member of the conspiracy is supported by the fact that the trial court did not give a *Pinkerton* instruction with respect to him. If anyone thought that Mr. Kasvin was a co-conspirator, the *Pinkerton* charge would have been appropriate. Clearly, however, the trial court understood *Pinkerton*, as the panel in *United States* v. *Galiffa*, 734 F.2d 306 (7th Cir. 1984), recognized; the trial court did not give the *Pinkerton* charge with respect to Mr. Kasvin *precisely because* the court found insufficient evidence to connect him to the conspiracy.

Not only did the court of appeals erroneously ignore the trial court's finding, the court's conclusion about the evidence is unsupported by the record. The Seventh Circuit considered Mr. Kasvin to be a co-conspirator because 1) he visited the conspiracy headquarters; 2) he was assigned a code number; 3) he "on occasion" provided marijuana to the

organization; and 4) he purchased from the organization. Slip op. at 7. First, visits to headquarters at most show knowledge of the conspiracy. Second, the assignment of a coded number is only evidence of the intentions and actions of the proven conspirators; no evidence suggested that Mr. Kasvin ever knew of the assigned number. Third, this Court's statement that Mr. Kasvin provided marijuana to the organization received marijuana as in-kind payment. No evidence showed Mr. Kasvin to be anything but an independent purchaser. Fourth, purchasing from a conspiracy does not make one a conspirator. *See United States* v. *Varelli*, 407 F.2d 735 (7th Cir. 1969). Therefore, this Court's *de novo* finding that Mr. Kasvin was a conspirator cannot be supported.

CONCLUSION

Accordingly, Richard Kasvin respectfully requests that a writ of certiorari issue to the Seventh Circuit Court of Appeals.

Respectfully submitted,

_____

One of the Attorneys for
Petitioner, Richard Kasvin

Of Counsel:

PATRICK A. TUITE
DAVID S. MEJIA
The Law Offices of
PATRICK A. TUITE, LTD.
Suite 900
19 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Petitioner

EXHIBIT A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 84-1292

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RICHARD KASVIN,

Defendant-Appellant

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 82 CR 255, Thomas R. McMillen, *Judge*

ARGUED SEPTEMBER 11, 1984—DECIDED MARCH 13, 1985

Before POSNER, *Circuit Judge*, SWYGERT, *Senior Circuit Judge*, and DUPREE, *Senior District Judge**

DUPREE, *Senior District Judge*. Richard Kasvin along with seven others was charged in Count I of a four-count indictment with conspiring to knowingly and intentionally distribute and possess with intent to distribute marijuana in violation of 21 U.S.C. § 846 and in Count IV of the indictment with the substantive offense of possession with intent to distribute 234 pounds of marijuana in violation of 21 U.S.C. § 841(a)(1). Following a directed verdict of acquittal as to Count IV Kasvin was convicted by a jury of Count I, the conspiracy count, and he appeals from a sentence of five years' imprisonment and a $15,000 fine. Finding no error in the trial, we affirm.

---

* The Honorable F. T. Dupree, Jr., Senior District Judge of the Eastern District of North Carolina, is sitting by designation.

Six of Kasvin's co-defendants entered guilty pleas, and he and the remaining co-defendant, Tom Galiffa, were each tried and convicted in a joint trial held in April, 1983. Shortly thereafter Galiffa appealed his conviction, but as a result of Kasvin's post-trial motions for judgment of acquittal and in the alternative for a new trial final judgment in his case was not entered until January, 1984. Meanwhile the appeal in Galiffa's case had been argued on November 8, 1983, and the decision was rendered on May 11, 1984 while Kasvin's case was still pending on appeal. *United States v. Galiffa*, 734 F.2d 306 (7th Cir. 1984). As we shall see, the decision in *Galiffa* provides much of the controlling law in the case at bar.

In late 1977 or early 1978 four of Kasvin's co-defendants named in the indictment agreed to purchase, sell and distribute marijuana. Over the next five years some twenty individuals were associated with the conspiracy and were engaged in such activities as couriers, distributors, bookkeepers, drivers, warehousers and dealers. The headquarters for the operation became a house in Ingleside, Illinois. As a result of surveillance by federal law enforcement officers this house was raided on April 9, 1982 at which time defendant Kasvin and seven others were arrested inside the house. A valid search warrant produced 234 pounds of marijuana, some cocaine, an electronic scale, $10,440 in cash, narcotics paraphernalia and records of numerous drug transactions.

In order to link Kasvin to the conspiracy the government called to the stand several of his co-defendants who had entered guilty pleas and one or more unindicted co-conspirators. These witnesses testified that Kasvin was known to them as "Smith" or "Smyth"; that the persons associated with the operation were given numbers and that Kasvin's number was 5; that No. 5 was the single largest "customer" of the business but that at times he provided the organization with some high quality marijuana apparently obtained by him through some other source; and that for more than a year Kasvin was seen at the organization's place of business several times weekly.

A record of his phone number was kept by the organization in code.

A reconstruction of the records which the organization began keeping about July of 1981 showed that in the ensuing eight months prior to the raid on April 9, 1982 Kasvin obtained approximately 3,600 pounds of marijuana from the business and delivered to it well over $1,000,000 in cash.

At the close of the government's evidence the district judge expressed the opinion that the evidence outlined above did not suffice to show that Kasvin was a member of the conspiracy or that he had knowingly and intentionally possessed with intent to distribute the 234 pounds of marijuana seized in the raid. Accordingly, Count IV as it related to Kasvin was dismissed, but at the same time the judge expressed the view that the evidence was sufficient to go to the jury on the question of whether Kasvin was guilty of aiding and abetting the conspiracy. He therefore declined to dismiss Count I.

The defendants on trial, Kasvin and Galiffa, offered no evidence, and the case was submitted to the jury on Counts I and IV against Galiffa and Count I (the conspiracy count) against Kasvin. On Count I the jury was instructed as follows:

> * In order to establish the offense of conspiracy the government must prove these elements beyond a reasonable doubt: (1) that the alleged conspiracy existed, and, (2) that the defendant knowingly and intentionally became a member of the conspiracy.
>
> A conspiracy is a combination of two or more persons to accomplish an unlawful purpose. A conspiracy may be established even if its purpose was not accomplished.
>
> In determining whether the alleged conspiracy existed, you may consider the actions and statements of all the alleged participants. The agreement may be

inferred from all the circumstances and the conduct of all the alleged participants.

In determining whether the defendant became a member of the conspiracy you may consider only the acts and statements of that particular defendant.

To be a member of a conspiracy, the defendant need not join at the beginning or know all the other members or the means by which the purpose was to be accomplished. A defendant need not personally perform all the acts alleged in Count 1. The government must prove beyond a reasonable doubt, from the defendant's own acts and statements, that he was aware of the common purpose and was a willing participant.

Section 846 of Title 21 of the United States Code, which is the section under which Count 1 is brought, provides in pertinent part:

> "Any person who conspires to distribute or possess with the intent to distribute a controlled substance commits an offense against the United States."

* * * * *

You are instructed as a matter of law that marijuana is a Schedule I controlled substance. It is not defined as a narcotic drug in the statute.

Any person who knowingly aids, abets, counsels, commands, induces or procures the commission of a crime is guilty of that crime. However, that person must knowingly associate himself with the criminal venture, participate in it, and try to make it succeed.*

** You are instructed that the mere relationship of a buyer and seller of drugs does not alone establish a conspiracy.

> While the relationship of buyer and seller is insufficient to make the buyer a conspirator with the seller, a buyer and seller in marijuana transactions can be conspirators together if they have an agreement to act in concert. This agreement can be proven by circumstantial evidence.
>
> Presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish the defendant's guilt.**[1]

After several hours of deliberations the jury returned the following verdict as to defendant Kasvin:

> We, the jury, find the defendant, RICHARD KASVIN, GUILTY as charged in Count One of the indictment.

As previously stated, the case was submitted to the jury only on Count I as to Kasvin. The jury returned a guilty verdict against Galiffa as to Counts I and IV.

On appeal Kasvin asserts as error the trial court's instructions to the jury on aiding and abetting the conspiracy and the admission of the records kept by the conspirators under an exception to the hearsay rule.[2]

---

[1] That portion of the instructions between the single asterisks was tendered by the government. The portion between the double asterisks was tendered by defendant Kasvin. It was at the suggestion of counsel for Kasvin at the charge conference that the two were combined by the court and submitted to the jury.

> MR. TUITE: They are going to argue [the government's theory] and we are going to argue different. I think the court has picked up on our concern. The court will be telling them all the circumstances they can use in finding a conspiracy. That is for them to decide based on the arguments and the evidence.

[2] Prior to the submission of the case to the jury the government continued to insist, and correctly so, we think, that the

(Footnote continued on following page)

INSTRUCTION ON AIDING AND ABETTING

The decision in the case of Kasvin's co-defendant, *United States v. Galiffa*, 734 F.2d 306 (7th Cir. 1984), established the following principles of law which apply with equal force in this case:

1. A defendant can be convicted of aiding and abetting a conspiracy for deeds other than acting as a liaison for the parties to the conspiratorial agreement provided the defendant has knowledge of the conspiracy's existence at the time of his act.

2. One can aid and abet a conspiracy without necessarily participating in the original agreement.

3. The charge of aiding and abetting under 18 U.S.C. § 2(a) "need not be specifically pleaded and a defendant indicted for a substantive offense can be convicted as an aider and abettor" upon a proper demonstration of proof so long as no unfair surprise results.

4. No fatal amendment to an indictment occurs where a defendant may have been convicted as a principal in a conspiracy by aiding and abetting it even though he was not charged with aiding and abetting in the original indictment.

In order to determine the applicability of these principles to the case at hand it is necessary to make only two factual inquiries: Whether Kasvin knew of the conspiracy's existence at the time of his acts and whether his acts aided and abetted the business of the conspiracy. In our view the evidence overwhelmingly supports an affirmative answer to each of these inquiries. For several

---

[1] *continued*

evidence would fully support a finding that Kasvin was a member of the conspiracy. Tr.pp. 504-506, 552. Without differentiating between the two defendants on trial one of the government's attorneys (with the court's permission, Tr.p. 507) argued this theory to the jury while the other argued the aiding and abetting theory.

years he had visited the headquarters of the conspiracy several times weekly, had been assigned a number just as some of the admitted members of the conspiracy had been assigned, his telephone number had been encoded, on occasion he provided the organization with marijuana for use in its business, his transactions with the conspiracy ran into hundreds of thousands of dollars annually but unlike an ordinary customer of a business, he simply picked up quantities of marijuana from headquarters, presumably disposed of it through a distribution network, and brought the money back from time to time in amounts which, so far as the records show, bore no definite relationship to the amounts of marijuana carried away at any particular time. To suggest in the face of this evidence that he was not aware of the conspiracy's existence would be to ascribe to him a naivete seldom seen in participants in a criminal venture of this magnitude. It is equally obvious that as a link in the distribution chain Kasvin not only aided and abetted the criminal operation but was indeed essential to its success.

At the time Kasvin's brief was filed in this court *Galiffa* had not been decided but following its decision a reply brief was filed in which it was stated:

> Although Kasvin and his counsel continue to regard [the principles enunciated in *Galiffa*] as erroneous, they do not expect one panel of this court to overrule a decision rendered by another panel. A petition for *en banc* consideration, if necessary, is, counsel recognize, the only means to revise the *Galiffa* opinion.

At the same time counsel continue to argue that *Galiffa* is not dispositive of this case. Unlike *Galiffa*, so the argument goes, the trial judge in this case found that Kasvin was not a member of the conspiracy, and he was acquitted by the judge on the possession charge contained in Count IV of the indictment. Moreover, the argument continues, one does not aid and abet a conspiracy simply by purchasing the illegal product which the conspirators have for sale. The argument is flawed in several respects.

In the first place, it assumes that the trial judge ruled as a matter of law that Kasvin was not a member of the conspiracy. He did not. Apparently the judge interpreted the evidence to show only that Kasvin was an independent dealer in marijuana whose relationship to the conspiracy was simply that of buyer and seller. The case was submitted to the jury, however, on instructions which, as we have seen, permitted the jury to find Kasvin guilty of the crime of conspiracy as charged in Count I of the indictment as well as aiding and abetting the conspiracy, and the general verdict returned simply found Kasvin guilty of conspiracy as charged in Count I.[3]

While we agree that the evidence was susceptible of the interpretation apparently placed upon it by the trial court, in our view it was equally open to the interpretation that Kasvin was indeed a member of the conspiracy itself. The jury was not obliged to accept Kasvin's characterization by some of the witnesses as a "customer" of the organization but was at liberty to draw what seems to us to be the equally plausible inference based on the frequency of his contacts with the organization, the use of a number and one or more aliases to identify him on the books, the fact that he sometimes furnished substantial quantities of marijuana to the organization, and the nature and extent of the so-called "credit transactions" that this man was no arms-length customer in the usual sense but was in fact one of the principals in the drug distribution ring.

On the other hand, if the jury simply regarded Kasvin as a major customer of the ring, it was fully justified in finding that he associated himself with the criminal venture, participated in it as something he wished to bring about and sought by his actions to make it succeed. It is difficult to imagine what greater contribution Kasvin

---

[3] Since the evidence previously summarized fully supported both theories, the problem of a judicial amendment of the indictment dealt with in *Stirone v. United States*, 361 U.S. 212 (1960), does not arise in this case.

could have made to the financial success of the venture than by becoming its largest regular customer. In short, if he was not a member of the conspiracy, he was clearly an aider and abettor of it.

The remaining arguments of the defendant have been disposed of in the case of Kasvin's co-defendant, Galiffa, which, it will be recalled, involved the identical instructions under consideration here. *United States v. Galiffa*, 734 F.2d 306, 309-313 (7th Cir. 1984).[4]

THE BUSINESS RECORDS

Approximately nine months prior to the raid in which defendants were arrested on April 9, 1982 the organization began keeping records of marijuana purchases and sales. These records consisted of receipts and disbursements showing incoming and outgoing shipments of marijuana and payments made in connection with the transactions. These records were entered in a general ledger by one of the defendants named in the indictment, Kathryn Rodger, a girlfriend of another of the conspirators, Stuart Ashenfelter, who, with another co-defendant, Leroy Schubert, headed up the conspiracy. Among these records were numerous receipts showing transactions between a "No. 5" and the organization, and other witnesses had identified Kasvin as being No. 5.

Following extensive questioning of Ashenfelter by counsel for the government and defendant Kasvin the

[4] As additional support for his argument Kasvin repeatedly calls attention to the fact that Count IV, the possession count, was dismissed at the close of the government's evidence. While the correctness of this ruling is not before us, in view of our finding that the evidence was sufficient to show Kasvin's membership in the conspiracy, it follows that the count should have been submitted to the jury at least under the principle established in *Pinkerton v. United States*, 328 U.S. 640 (1946). Kasvin's reliance on this questionable ruling in his favor is therefore misplaced.

trial judge found the records to have been made and kept in the course of a regularly conducted business activity by a person with knowledge as a regular practice of the business activity and that the records were trustworthy for the purpose for which they were offered. (Tr.pp. 330-332.) The records were therefore admitted as business records under Rule 803(6) of the Federal Rules of Evidence, and upon the further finding that the provisions of Rule 803(24) had been satisfied, the trial judge assigned this rule as an additional basis for admitting the records.[5]

On appeal Kasvin, while conceding that records are no less admissible because they reflect illegal transactions, *see United States v. McPartlin*, 595 F.2d 1321, 1349 (7th Cir. 1979), strenuously contends that the records were shown not to have been reliable and that the trustworthiness requirements of Rule 803(6) and 803(24) were not satisfied. In support of this contention Kasvin points to Ashenfelter's testimony that at times the records were made by persons who may have been under the influence of cocaine; that it is probable that the records contained errors; that even if his girlfriend, Rodger, who lived in the house with him at the organization's headquarters, had made errors in keeping the records, she would not have been subject to discharge; that Ashenfelter himself was mistaken as to the number assigned to Kasvin on the books; that "there was no consistency of records as ordinarily found or supposed to be found in a legitimate business;" and that they were not regarded by Ashenfelter himself as being reliable.

It appears, however, that on voir dire examination by the government Ashenfelter admitted that while he didn't keep the records for income tax purposes, he did keep them to show the amount of money owed by people to

---

[5] In conformity with his view that the evidence failed to show Kasvin a member of the conspiracy the trial judge was careful to exclude as against Kasvin all hearsay statements of alleged co-conspirators tending to link him with the conspiracy. Rule 801(d)(2)(E), F.R.E.

whom he distributed marijuana; that when errors were found that "hopefully they were corrected;" that the records were kept to show receipts of large sums of money as well as payments made by the organization to suppliers; and that the records would more accurately reflect the quantities of marijuana which passed through the headquarters than would Ashenfelter's memory.

Under Rule 104 of the Federal Rules of Evidence preliminary questions concerning the admissibility of evidence are determined by the court. The focus of the business records exception under Rule 803(6) is the requirement that the record be made in the course of and as a regular practice of a regularly conducted business activity. *United States v. Licavoli*, 604 F.2d 613, 622 (9th Cir. 1979). Business records may be excluded in the trial court's discretion if the source of information or the method or circumstances of preparation indicate lack of trustworthiness. *United States v. Patterson*, 644 F.2d 890, 900 (1st Cir. 1981). Rule 102, F.R.E., requires that the Rules of Evidence be construed "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." We hold that the evidence in this case fully justified the finding by the trial court that all the requisites of Rule 803(6) were satisfied, and the records in question were properly admitted. *United States v. Hedman*, 630 F.2d 1184, 1197 (7th Cir. 1980). This conclusion makes it unnecessary to consider and decide the admissibility of the records under Rule 803(24).

In summary, we hold that Kasvin was properly convicted under the general verdict either as a member of the drug ring conspiracy or as an aider and abettor of the same and that there was no error in the admission of the business records of the organization. The judgment of conviction is therefore

AFFIRMED.

SWYGERT, *Senior Circuit Judge*, dissenting. The majority holds that the defendant was properly convicted of a conspiracy to knowingly and intentionally distribute and possess with intent to distribute marijuana because the defendant aided and abetted the conspiracy by purchasing large quantities of marijuana from the actual conspirators and because the evidence was sufficient to show that the defendant was a coconspirator. I dissent because the defendant could not have been convicted as an aider and abettor of the conspiracy and because the defendant was acquitted by the trial judge of being a member of the conspiracy.

I

The defendant's acquittal on the criminal conspiracy charge, *see* discussion *infra* at 20-28, does not necessarily insulate him from conviction for aiding and abetting the conspiracy. *See United States v. Powell*, ____ U.S. ____, 105 S. Ct. 471, 478 (1984). *See also United States v. Galiffa*, 734 F.2d 306, 312 (7th Cir. 1984) (judge's *sua sponte* instructions on aiding and abetting the conspiracy was not an impermissible amendment of the indictment). Nevertheless, under the facts of this case, there was no warrant for the judge to give the aiding and abetting instruction.

I recognize that this circuit has recently given an expansive definition of aiding and abetting a conspiracy under 21 U.S.C. § 846. *See Galiffa*, 734 F.2d at 306. With all due respect, I nonetheless view *Galiffa* as giving an unjustified, overbroad definition of that term. The penetrating analysis that is required in these types of cases necessitates a much narrower definition than that announced in *Galiffa*.

In *Galiffa* the court held that the crime of aiding and abetting a conspiracy exists. It further held that the

concept of aiding and abetting a conspiracy is not merely applicable in cases in which a defendant is alleged to have brought two or more persons together so that those two persons might themselves conspire. Rather, *Galiffa* holds that the concept is applicable in any situation in which a defendant knows a conspiracy exists, commits an act designed to further the conspiracy, and intends by his acts to aid the conspiracy. *Id.* at 310 (citing *United States v. Alverez*, 610 F.2d 1250, 1257, *rev'd on other grounds*, 625 F.2d 1196 (5th Cir.) (en banc), *cert. denied*, 451 U.S. 938 (1980); *United States v. Walker*, 621 F.2d 163 (5th Cir. 1980), *cert. denied*, 450 U.S. 1000 (1981); *United States v. Lane*, 514 F.2d 22 (9th Cir. 1975); W. LaFave & A. Scott, Criminal Law § 61 at 462-63 (1972); Comment, *Complicity in a Conspiracy as an Approach to Conspiratorial Liability*, 16 U.C.L.A. L. Rev. 155, 162 (1968)). Employing this test, this court held that Galiffa aided and abetted the conspiracy by engaging in acts that facilitated the distribution of marijuana, e.g., driving on trips to pick up marijuana from suppliers, weighing and marking bales of marijuana, issuing receipts and delivering marijuana to customers, and being supported by the proceeds from the illegal operation. In my view this did not make Galiffa an aider and abettor but rather made him a coconspirator.

The concept of aiding and abetting that the court in *Galiffa* applied was that enunciated by Judge Learned Hand in *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)—a concept which has been uniformly adopted by the federal courts of appeals. But that concept cannot be mechanically or formalistically applied without closely examining the actual meaning of "aid and abet."

Aiding and abetting requires activity that is integral to the illegal conduct yet extraneous of it. In other words, aiding and abetting connotes assisting or facilitating illegal conduct without directly engaging in that conduct. When a person engages directly in the conduct, he becomes a part of it—a principal—and is not aiding and

abetting. *See* Perkins, *Parties to Crime*, 89 U. Pa. L. Rev. 581, 596-604 (1941).

These principles are applicable to conspiracy. In general, a conspiracy is an "agreement among two or more persons to commit a crime and an overt act in furtherance of the illegal agreement." *United States v. Greer*, 467 F.2d 1064, 1069 (7th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973). Thus, a person aids and abets a conspiracy not by engaging in crimes that are the object of the conspiracy, but rather by engaging in separate conduct designed to facilitate the success of the conspiracy. There is some authority that the only manner in which a defendant may aid and abet a conspiracy is by bringing two other persons together to conspire. *See People v. Strauch*, 240 Ill. 60, 80 N.E. 155 (1909); Comment, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 934 (1959). There is some merit to this argument because the crime of conspiracy always requires the act of agreement. But it must be that certain other "extraneous acts" might also aid and abet a conspiracy if they facilitate agreement by keeping the group of conspirators together and the conspiracy going. Thus, liability for aiding and abetting a conspiracy might be imposed on a defendant who brings two parties together with the intention and knowledge that they will conspire, *see, e.g., Strauch*, 240 Ill. 60, 88 N.E. 55, or warns drug conspirators of undercover police activity, *see, e.g., Lane*, 514 F.2d 22, or permits one's home to be used as a rendezvous for drug trafficking, *see, e.g., United States v. Spetz*, 721 F.2d 1457, 1477-78 (9th Cir. 1983), or provides police protection to drug dealers, *see, e.g., United States v. Ambrose*, 740 F.2d 505 (7th Cir. 1984), or acts as a paid bodyguard to the principal of an illegal scheme to distribute stolen securities, *see, e.g., United States v. Miller*, 552 F. Supp. 827 (N.D. Ill. 1982). In these cases, the clear theoretical and practical difference between aiding and abetting a conspiracy and aiding and abetting the substantive offense that is the object of the conspiracy simply was not and could not be merged.

I am aware that at least one other circuit has apparently adopted the broad concept of "aid and abet" announced in *Galiffa*. *See Walker*, 621 F.2d at 166-67. Although I believe that that case is distinguishable—there the defendant primarily argued that the aid and abet instruction was error because it implicitly lowered the Government's burden of proof—the court in *Walker*, as did the court in *Galiffa*, gave an overbroad interpretation of aiding and abetting a conspiracy.

Neither *Direct Sales Co. v. United States*, 319 U.S. 703 (1943), nor *United States v. Falcone*, 311 U.S. 205 (1940), undermine the validity of this approach. In both of those cases the issue was what type of conduct on the part of a supplier was necessary to hold the supplier in the buyer's illegal conspiracy to distribute contraband. In *Falcone* the Court specifically refused to consider the Government's argument that a supplier could be connected with a conspiracy among the buyers on the basis of the aiding and abetting statute because it believed that, even if this were permissible, the Government had failed to prove the necessary element of knowledge of the conspiracy. The Court also refused to consider the Government's other argument that the sellers were actual conspirators because the Government could not prove that the sellers participated in the conspiracy.

In *Direct Sales* the Court reviewed a drug supplier's conviction for conspiracy where the Government acknowledged that its only theory of liability was that the supplier was a conspirator because it sold large quantities of drugs to buyers. The defendant then argued that *Falcone* insulated suppliers from conspiratorial liability on this theory. The Court disagreed noting that *Falcone* was based on the fact that the mere act of supplying "was [not] of such a character as imported an agreement or concert of action between the buyer and the seller amounting to conspiracy," *Direct Sales*, 319 U.S. at 709. Although the Court did make reference, in *dicta*, to "aiding and abetting a conspiracy," *id.*, it is unclear from the context whether the Court used that phrase as a term

of art or whether it meant that suppliers as aiders and abettors become actual conspirators, *see United States v. Salerno*, 485 F.2d 260, 263 (3d Cir. 1973), *cert. denied sub nom., Rossi v. United States*, 415 U.S. 994, *reh'g denied*, 416 U.S. 1000 (1974); *see also Developments, supra*, 72 Harv. L. Rev. at 931-32 and cases cited therein, or whether the aiding and abetting at issue is of the conspiratorial group or the crime of conspiracy, *see Developments, supra*, 72 Harv. L. Rev. at 934. Thus very little, if any, reliance can be placed on this *dicta* in support of the argument that suppliers or buyers can be aiders and abettors of a conspiracy to distribute contraband. *See* Comment, *supra*, 16 U.C.L.A. L. Rev. at 163-64 n.31. This is particularly true in the case of buyers who are the actual distributees of contraband and who do not, even indirectly, share in the profits of the conspiracy.

Even those commentators who argue that sellers or buyers can be liable as aiders and abettors of a conspiracy do so on the premise that proof of an overt act is necessary to convict for conspiracy. *See* Comment, *supra*, 16 U.C.L.A. L. Rev. at 162. Unlike most other conspiracies conviction for drug conspiracy under 21 U.S.C. § 846 does not require proof of any overt act. *United States v. Lee*, 622 F.2d 787, *reh'g denied*, 633 F.2d 582 (5th Cir. 1980), *cert. denied*, 451 U.S. 913 (1981). Thus reliance on those authorities to support the conviction of a buyer or seller who has only participated in objectives of the drug conspiracy as an aider and abettor of the conspiracy is misplaced.

In this case, the Government insisted at trial that a customer who frequently purchases large amounts of illegal goods from a conspiracy may under certain circumstances be found guilty as a coconspirator. But, as I note in Part III of this dissent, the trial judge found there was insufficient evidence to create an issue as to whether the defendant was a member of the conspiracy, and, even if it

was questionable whether the judge was warranted in granting the directed verdict in favor of the defendant, this court may not engage in *de novo* decisionmaking at this juncture by second-guessing the trial judge.

Under this state of affairs the only charge that remained was that of aiding and abetting, and the only evidence to support this theory of liability was that the defendant was a frequent customer of the organization who bought large amounts of marijuana on credit and who was apparently a friend of the conspirators. But these distributions to the defendant were overt acts and objectives of the conspiracy. They were not extraneous to it; they are analogous to plunging the knife into the murder victim, not to providing the murderer with the knife. Although the majority suggests that "on occasion he [Kasvin] provided the organization with marijuana for use in its business," *ante* at 7, the only evidence that I am able to discern from the record with respect to this assertion is that at one time Kasvin paid for marijuana he had received from the conspirators with approximately twenty-three pounds of marijuana. No suggestion was ever made that this marijuana was used by the conspirators in their business, and, in fact, the Government argued only that this had been payment in-kind. Thus, in applying the analysis of what aiding and abetting a conspiracy means, the defendant's conduct did not come within that meaning.

The Fifth Circuit has correctly noted that the concept of aiding and abetting a conspiracy has "rarely [been] used," *Alverez*, 610 F.2d at 1257. But given this circuit's decision in *Galiffa* and the extension of *Galiffa* to the facts of this case, the long arm of the law will now reach to impose conspiratorial liability on many who may have had little contact with the conspirators or who are clearly guilty of crimes less severe than conspiracy. *See United States v. Gallagher*, 565 F.2d 981, 984-85 (7th Cir. 1977); *United States v. Hoffa*, 367 F.2d 698, 732-33 (7th Cir. 1966) (Swygert, J., dissenting). "The juxtaposing of the offenses of aiding and abetting and conspiracy in the same

count of an indictment provide a basis for broadly expanding criminal liability with respect to complicitous parties," *Miller*, 552 F. Supp. at 830, and should have been considered with more circumspection and discreetness than that employed in *Galiffa* or by the majority here.

II

Even if I were to agree that the broad theory of aiding and abetting a conspiracy as announced in *Galiffa* is correct and should govern this case, *Galiffa* does not compel the conclusion that "if the jury simply regarded Kasvin as a major customer of the ring, it was fully justified in finding that [Kasvin was an aider and abettor because] he associated himself with the criminal venture, participated in it as something he wished to bring about and sought by his actions to make it succeed." *Ante* at 8. "A defendant is not culpable of aiding and abetting a conspiracy merely by aiding and abetting the commission of a crime which is the object of a conspiracy," *Miller*, 552 F. Supp. at 830 (citing *Pinkerton v. United States*, 328 U.S. 640, 643 (1946)).

Moreover, even if all of the other evidence introduced against Kasvin is considered and viewed in the light most favorable to the Government, it is insufficient under *Galiffa* to establish beyond a reasonable doubt that Kasvin associated himself with the criminal venture and sought by his actions to make it succeed. I concede that Kasvin knew of the conspiracy, but that is only part of the required analysis.

The evidence against Kasvin is that from approximately 1978 to 1982 he was a "constant" customer of the drug ring. From July 1981 to December 1981 he accounted for approximately fifteen percent of the organization's credit sales. Ninety-six percent of the organization's sales were on credit. Kasvin, like all customers, was assigned a customer number for accounting purposes. Kasvin, as did

other customers, picked up marijuana from the organization's headquarters. Kasvin frequently visited the organization's headquarters at times on business, some times on a social call. Kasvin's telephone number was encoded, along with the telephone numbers of friends and associates of the drug conspirators, on a card found in the wallet of a principal of the drug ring. There was no evidence that Kasvin issued receipts, helped package marijuana, or resided with the drug conspirators.

The only acts that show the defendant's connections to the drug ring are his frequent purchases of drugs from the organization. The credit sales, the assignment of a customer number to Kasvin, or the encoding of Kasvin's telephone number were all acts of the conspirators over which defendant had no control. This evidence shows only the motives of the conspirators in wishing to transact their business in an orderly manner and in wishing to keep in contact with Kasvin. It does not show that Kasvin desired a continued association with the conspirators.

Thus the only probative evidence against Kasvin on the aid and abet theory was that he accounted for approximately fifteen percent of the organization's credit sales. But if a person purchases fifteen percent of the goods of a department store that does not mean, without more, that the person seeks to make the store succeed or that he associates with it. Although the department store has an interest in keeping the customer because of the profits that customer provides, the customer does not necessarily have an interest in making or an intent to make the store succeed. He may proceed to another store if that store ultimately fails. Similarly in the instant case, Kasvin's purchases do not show that he sought to make the drug distribution conspiracy succeed. Although the suppliers may have relied on Kasvin as a distribution outlet we do not know if Kasvin's purchases from this conspiracy accounted for one percent or one hundred percent of his total contraband purchases, and hence no inference can be drawn from the mere fact of these purchases that Kasvin

cared about the success of this drug organization. In sum, the facts indicate that Kasvin was nothing more than an independent entrepreneur. In *Galiffa*, by contrast, the facts show that Galiffa lived with the coconspirators over a long period of time, acted as a "go-fer" for the conspirators, and was supported by the profits of the drug ring. Thus, in *Galiffa* the inference could properly be drawn that Galiffa had an interest in the success of the conspiracy.

The result the majority reaches in this case is not only incorrect as a matter of law, but also represents an unwarranted extension of *Galiffa*. Although *Galiffa* did decide that under certain circumstances a person may be guilty of aiding and abetting a conspiracy, it did not necessarily decide the question of whether aiding and abetting the objective of the conspiracy aids and abets the conspiracy or whether being the distributee of a drug conspiracy aids and abets the objective of the conspiracy. The majority's refusal to consider these questions suggests an impermissible harmless error approach. *See infra* at 28.

III

Defendant argued that one reason this case is not controlled by *Galiffa* is that in Kasvin's case the trial judge ruled as a matter of law that the evidence was insufficient to show that Kasvin was a coconspirator. The majority apparently interprets the defendant's argument as questioning whether the judge ever granted a directed verdict and thus implicitly challenging on appeal the sufficiency of the evidence with respect to that theory of liability. Thus in order to uphold Kasvin's conviction the majority must review and sustain the sufficiency of the evidence with respect to both theories of liability. *See Galiffa*, 734 F.2d at 309 n.4. This the majority proceeds to do. It first rejects defendant's position that the trial judge directed a verdict on this issue. It then holds that, contrary to the "view"

expressed by the judge, the evidence was sufficient to link Kasvin to the conspiracy as a coconspirator. Finally, without considering any of the other arguments presented to distinguish *Galiffa*, the majority perfunctorily proceeds to extend Galiffa to the facts of this case.

I do not agree that this is the proper interpretation of defendant's argument. Defendant is not challenging *on appeal* the sufficiency of the evidence on the coconspiracy theory. The trial judge has already resolved this issue in his favor. For this reason, there was no question raised by either party on appeal whether the directed verdict was ever granted. Rather, Kasvin is arguing that one acquitted as a coconspirator may not be convicted as an aider and abettor of the conspiracy. *Galiffa* is distinguishable because in that case neither the trial judge nor the jury ever acquitted Galiffa of being a coconspirator. The validity of Kasvin's particular argument is questionable, however, in light of *Powell*, 105 S. Ct., 471; but it is unnecessary to resolve this issue because, on the evidence, Kasvin could not have been convicted as an aider and abettor.

Even if I were to agree with the majority's characterization of defendant's argument, I submit that the defendant was acquitted as a coconspirator, and hence there was no justification for the majority to discuss the coconspiracy theory. I concede that particular statements in the record and acts by the trial judge and trial counsel lend support to the majority's position on this issue: the district judge read the conspiracy count without any limiting instruction, defense counsel insisted upon and was granted an instruction that the mere relationship of buyer-seller does not establish a conspiracy, the government seemingly argued in closing that Kasvin was a coconspirator, and, as the majority notes, defense counsel appeared to concede that the prosecutor would argue that Kasvin was a conspirator. Nonetheless, when the record is examined as a whole, it is clear that but for the aiding and abetting charge the district court would have directed a

verdict in favor of Kasvin on the conspiracy count (Count I) and that all parties concerned understood that Count I only went to the jury on the aiding and abetting theory. This means that the district court at least *de facto* directed a verdict on the issue of whether Kasvin was a member of the conspiracy.

After the Government rested its case, Kasvin moved for a judgment of acquittal on the conspiracy (Count I) and possession (Count IV) charges. The trial judge granted the motion with respect to Count IV (Tr. 503), but denied the motion as to Count I solely on the basis that there was, in his view, sufficient evidence to convict Kasvin for aiding and abetting the conspiracy (Tr. 503, 506). When the Government persisted in its argument that Kasvin was a member of the conspiracy, the judge stated:

> The cases that you are citing, including the Seventh Circuit case—I have read the cases you have cited—I really on the issue of whether or not he [Kasvin] was a member of the conspiracy.
>
> [Prosecutor]: Correct. That is our argument, that he was a member of the conspiracy.
>
> [The court]: *I have, in effect, ruled against you on that.*
>
> [Prosecutor]: I understand that, but that doesn't keep me from arguing, does it?
>
> [The court]: It doesn't keep you from arguing it except now we are going to take our motion call.

Tr. 503 (emphasis added).

At a later stage in the proceedings, the Government again advanced its conspiracy theory. The following colloquy ensued:

> [Defense counsel]: If this argument is being made to reverse your Honor's ruling, I don't think he can do it. A judgment of acquittal has been entered.

> [Prosecutor]: I am making it to try to convince the Court that the Court is in error in its conspiracy theory and that indeed Kasvin is a coconspirator.
>
> [The court]: I am not saying that a buyer or a seller could not be a member of the conspiracy. I am saying in this particular case there is no evidence that he was anything other than an arms-length purchaser.... I will say this much: that if I don't give it I would probably have to direct a verdict with respect to *Mr. Kasvin because that is the only way I can see that you can hold him here.*

Tr. 533-35 (emphasis added).

> [The court]:... As a matter of fact, as I indicated before, I would be inclined to direct with respect to Count I if it weren't for the aiding and abetting theory that the government isn't pressing, but that I raised myself.

Tr. 548.

These statements by the trial judge compel the conclusion that even though the judge did not formally enter a directed verdict on Count I he held as a matter of law that Kasvin was not a coconspirator and that he would have directed out all of Count I if he had found specific caselaw prohibiting the giving of a jury instruction on the aid and abet theory.

Support for this proposition can be found in the Government's statements made at the sentencing hearing in response to concerns raised by the trial judge with respect to possible errors committed by admitting evidence against Kasvin as a coconspirator rather than as an aider and abettor and by giving a general instruction on aiding and abetting when it was never intended to apply to defendant Galiffa:

> It is our position, your Honor, and as I think we indicated in our response, even though the instructions may not have the context in which the argu-

> ments were had, *we argued strictly conspiracy as to Mr. Galiffa and strictly aiding and abetting as to Mr. Kasvin. So, I don't see how the jury could have confused those two. We argued that he [Galiffa] was part of the conspiracy and that Mr. Kasvin aided and abetted by his purchases and cash payments to the organization.*

Tr. Vol. 1 of Proceedings before Judge McMillen 31-32 (emphasis added). *See also* Tr. Vol. 3 of Proceedings before Judge McMillen, Government's Jury Arguments 31-32.

In addition, in its brief to this court the Government acknowledged that Kasvin was convicted solely on the aid and abet theory:

> Although Judge McMillen suggested that the evidence was insufficient to prove Kasvin was a co-conspirator, he determined that the evidence was sufficient to prove Kasvin aided and abetted the conspiracy, *and allowed Count I to go to the jury on the aid and abet theory* (Tr. 548; 562). The government continues to maintain that the evidence was sufficient to prove Kasvin was a co-conspirator. However, since Judge McMillen instructed the jury regarding aiding and abetting, the issue of whether Kasvin could have been convicted as a co-conspirator is not presented here.

Government's Brief at 2 n.4 (emphasis added). And nowhere in its brief did the Government suggest that the coconspirator theory was a proper basis on which to sustain Kasvin's conviction. Although I concede that these statements by the Government could be intended to acknowledge that, even though the defendant may have been convicted by the jury as a coconspirator, it is equally probable that the defendant was convicted as an aider and abettor, and hence the validity of that theory of liability must be upheld by this court in order to obviate the necessity for a new trial. I believe, however, that the Government would have been far clearer in this regard if that had been its intention. Moreover, if this were its intention, then the Government must be conceding that

there has been no challenge on appeal to the sufficiency of the evidence on the coconspiracy theory.

The defendant as well appears to have interpreted the judge's ruling as an acquittal on the coconspirator theory of liability. At trial defense counsel argued repeatedly that the evidence was insufficient as a matter of law to hold defendant as a coconspirator. It seems improbable that a defense attorney who had almost convinced a trial judge of the insufficiency of the evidence and who had properly preserved this issue for appeal would not have raised that issue on appeal had it still been a viable basis for reversing the defendant's conviction. Moreover, defendant asked this court for a judgment of acquittal based on the erroneous aid and abet instruction—not for a new trial. True, not too much reliance can be placed on possible litigation strategy; but when viewed in light of the other matters that I have pointed out, it bolsters the conclusion that the district judge, in fact, did hold as a matter of law that there was insufficient evidence to go to the jury on a coconspirator theory.

There is also considerable force in the argument that it can be inferred from the fact that the district judge's directed verdict in favor of Kasvin on Count IV (the substantive offense of the conspiracy) that the district judge held as a matter of law that Kasvin was not a coconspirator. Under *Pinkerton v. United States*, 328 U.S. 640 (1946), one guilty of a conspiracy is guilty of all substantive offenses committed in furtherance of the conspiracy. It is true that one may be acquitted of the substantive offenses and still be convicted for conspiracy. *See, e.g., United States v. Duz-Mor Diagnostic Laboratory, Inc.*, 650 F.2d 223 (9th Cir. 1981); *United States v. Haynes*, 554 F.2d 231 (5th Cir. 1977). Such verdicts are generally regarded as inconsistent and incorrect as a matter of law. They are permitted to stand, however, out of deference to the jury's power to exercise leniency in a particular case. *United States v. Azzolino*, 651 F.2d 207 (3d Cir.), *cert. denied*, 454 U.S. 865 (1981). *See United States v. Maybury*, 274 F.2d 899 (2d Cir. 1960) (Judge Friendly questions

whether inconsistent verdicts are permissible in bench trials because no special policy considerations mandate deference to a legally incorrect compromise verdict by a trial judge). *But see United States v. West*, 549 F.2d 545, 553 (8th Cir.), *cert. denied*, 430 U.S. 956 (1977). *But cf. Harris v. Rivera*, 454 U.S. 339 (1981) (per curiam) (inconsistent verdict rendered in bench trial in state court is not a ground for habeas corpus relief). But even if an inconsistent verdict in a bench or jury trial does not necessarily require the reversal of a defendant's conviction, it is still a legal error.

Thus if we analogize the rulings of the trial judge in the instant case to a bench trial we can infer that by directing out the substantive offense before the case went to the jury the judge also found as a matter of law that the defendant was not a coconspirator—for it is unlikely that a trial judge who presumably understands *Pinkerton* and the rule of inconsistent verdicts would deliberately commit a clear error. Indeed, the trial judge did suggest that one reason he directed out Count IV was that he believed there was no evidence to link Kasvin to the conspiracy as a coconspirator. *See* Tr. 492.

The majority refuses to accept this line of argument because in its view the district judge did not absolve Kasvin as a matter of law of being a coconspirator and hence the directed verdict on Count IV cannot in any way demonstrate that the district judge as a matter of law ruled in Kasvin's favor on the coconspirator theory. The majority in effect denies that the defendant's argument has any merit whatsoever, but then proceeds to contradict itself by stating, *sua sponte*, that the district judge erred under *Pinkerton* in dismissing Count IV. *See ante* at note 4. *See also ante* at 3 where majority essentially accepts defendant's argument. The majority prefers to believe that the trial judge committed a clear legal error rather than to accept the more reasonable and logically consistent view that the trial judge committed no error.

The majority also places emphasis on the fact that the jury returned a general verdict of guilty as to Kasvin on the conspiracy charge. But in this case the jury was given a general verdict form and the jury's guilty verdict is entirely consistent with the judge's instructions that an aider and abettor has the same liability as a principal. *See Galiffa*, 734 F.2d at 309 n.4.

Based on the foregoing, the record clearly demonstrates that the trial judge did rule as a matter of law that Kasvin was not a coconspirator. The majority maintains that the trial judge did not rule as a matter of law that Kasvin was not a coconspirator because he did not specifically direct out all of Count I. By so doing, the majority in essence rejects the very case on which it relies to sustain Kasvin's conviction—*Galiffa*—where this court held that "all indictments are to be read as if the 'alternative provided by the aiding and abetting statute, . . . is included therein'." *Id.* at 312 (citations omitted). Thus, Count I of the indictment in this case contained at least two "constructive" counts, one which the judge directed out, the other which he did not. *See* Post-Trial Memorandum and Decision of District Judge at 1-2. I admit that the trial judge probably should have given a limiting instruction on Count I as to defendant Kasvin, but this error, if it was error, should not be compounded by the error of ignoring the judge's actual rulings.

In effect, the majority engages in a *de novo* review of the evidence and reverses the decision of the district judge on this issue. It does so by a cursory examination of the evidence and without discussing a single case dealing with the difficult issue of how much evidence is necessary to hold a buyer as a member of a conspiracy. The majority's reaction is tantamount to directing a verdict in favor of the Government which, of course, is impermissible, *see United States Broth. of Carpenters & Joiners of America v. United States*, 330 U.S. 395 (1947), and which deprives the defendant of any opportunity to contest the sufficiency of the evidence on that theory.

In my view, the majority's characterization of the defendant's argument as challenging the sufficiency of the evidence and its repeated discussion of the evidence with respect to the coconspiracy theory is a tacit admission of a harmless error approach—i.e., even if Kasvin was not an aider and abettor, he was certainly a coconspirator, and therefore he should be convicted of conspiracy. If this is indeed the majority's approach, an egregious error has been made. The doctrine of harmless error was never meant to wipe away fundamental procedural defects and to permit a conviction to stand willy nilly without regard to the requirements of due process.

In summary, under the narrow concept of aiding and abetting a conspiracy, Kasvin, as a purchaser of drugs from the conspiracy, did not aid and abet the conspiracy. Furthermore, even if the expansive concept of aiding and abetting a conspiracy as announced in *Galiffa* is applied, the evidence is insufficient to show that Kasvin was an aider and abettor. I submit that the trial judge directed a verdict in favor of defendant on the issue of coconspiratorial liability. Because I find that Kasvin could not have been convicted as an aider and abettor and that he was acquitted by the trial judge on the coconspiracy theory, I would reverse the conviction. *See Galiffa*, 734 F.2d at 309 n.4.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

EXHIBIT B

In The

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 14, 1985

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 84-1292

v.

RICHARD KASVIN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 82 CR 255

Thomas R. McMillen,
Judge

ORDER

On March 27, 1985, defendant-appellant filed a petition for rehearing with suggestion of rehearing *en banc*. A majority of the judges on the original panel* have voted to deny the petition, and all of the active judges have voted to deny the suggestion for rehearing *en banc*. The petition is therefore DENIED.

* Senior Circuit Judge Luther M. Swygert voted to grant the petition.

Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL
CLERK

(2)

No. 85-142

In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD KASVIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
MAURY EPNER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

13P

QUESTIONS PRESENTED

1. Whether a person can be found guilty of aiding and abetting an existing conspiracy.

2. Whether double jeopardy principles barred the court of appeals from affirming petitioner's conspiracy conviction on the ground that the evidence was sufficient to prove him guilty of conspiracy, even though the trial court had expressed the contrary view.

TABLE OF CONTENTS

	Page
Opinon below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Commonwealth v. *Zoller,* 490 A.2d 394, cert. granted *sub nom. Smalis* v. *Pennsylvania,* No. 85-227 (Nov. 4, 1985) 7-8

Harris v. *Rivers,* 454 U.S. 339 7

Levine v. *United States,* 430 F.2d 641, cert. denied, 401 U.S. 949 6

Nye & Nissen v. *United States,* 168 F.2d 846, aff'd, 336 U.S. 613 ..... 4, 6

United States v. *Alvarez,* 610 F.2d 1250, aff'd, 625 F.2d 1196, cert. denied, 451 U.S. 938 5

United States v. *DiFrancesco,* 449 U.S. 117 7

United States v. *Galiffa,* 734 F.2d 306 ..... 3, 4, 5, 6

United States v. *Lane,* 514 F.2d 22 5

United States v. *Miller,* No. 83-1750 (Apr. 1, 1985) 6

United States v. *Peoni,* 100 F.2d 401 4

United States v. *Powell,* No. 83-1307 (Dec. 10, 1984) 7

United States v. *Scott,* 437 U.S. 82 7

United States v. *Walker,* 621 F.2d 163, cert. denied, 450 U.S. 1000 ..... 5, 6

Constitution and statutes:

U.S. Const. Amend. V (Double Jeopardy Clause) 6, 7

18 U.S.C. 2 ..... 2, 6

21 U.S.C. 846 2

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-142

RICHARD KASVIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 757 F.2d 887.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1985. A petition for rehearing was denied on May 14, 1985. The petition for a writ of certiorari was filed on July 25, 1985, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to distribute marijuana, in violation of 21 U.S.C. 846 and 18 U.S.C. 2. He was sentenced to five years' imprisonment and fined $15,000. Pet. App. A1.

The evidence at trial established that petitioner obtained quantities of marijuana on a regular basis over the course of several years from a large-scale marijuana distribution enterprise. He also delivered sums of money to the enterprise and on at least one occasion supplied the enterprise with high quality marijuana that he had obtained from another source. Sometime in late 1977 or early 1978, four of petitioner's co-defendants agreed to purchase, sell, and distribute marijuana (Tr. 91-92, 108, 164-165). By 1981, petitioner, whose name and telephone number were kept by the enterprise in code, had become its largest customer. But unlike an ordinary customer, who would pay for his purchases upon receipt, petitioner simply picked up quantities of marijuana from the headquarters of the enterprise and periodically delivered to the enterprise sums of money that bore no particular relationship to the amounts of marijuana he had carried away on any specific occasion. Pet. App. A2-A3.

On April 9, 1982, federal law enforcement officers raided the group's headquarters. Petitioner and several others were arrested at this time, and the police ultimately seized 234 pounds of marijuana (Tr. 12-13, 21, 24-25, 28, 30-39). Between July 1981, when the enterprise began recording its transactions, and the April 1982 raid, petitioner obtained more than 3,600 pounds of marijuana from the enterprise and paid it more than $1 million (Tr. 464-469). He also supplied the group with 20 pounds of Jamaican marijuana and more than three pounds of sinsemilla, a high quality, seedless variety of marijuana (Tr. 459-460, 465).

2. Petitioner, along with seven others, was charged in Count I of a four-count indictment with conspiring to distribute and possess marijuana and in Count IV with the substantive offense of possession with intent to distribute. At the close of the government's evidence, the trial judge expressed the view that the evidence was insufficient to establish that petitioner had conspired to distribute marijuana. The judge found, however, that the evidence was sufficient to go to the jury on an aiding and abetting theory. Accordingly, he dismissed Count IV against petitioner but allowed Count I to go to the jury with instructions on both aiding and abetting and conspiracy. The jury subsequently found petitioner guilty "as charged in Count One of the indictment." Pet. App. A3-A5.

The court of appeals affirmed (Pet. App. A1-A11). The court concluded that the evidence at trial established that petitioner knew of the existence of the conspiracy at the time he acted and that "his acts [also] aided and abetted the business of the conspiracy" (Pet. App. A6). The court of appeals accordingly held that the evidence was sufficient to support his conviction on that theory (*id.* at A6-A7). The court rejected petitioner's contention that, as a matter of law, one cannot aid and abet an existing conspiracy. Relying upon its more detailed explanation in *United States* v. *Galiffa,* 734 F.2d 306 (7th Cir. 1984), in which one of petitioner's co-defendants had raised substantially the same claim, the court of appeals held that one can be convicted of aiding and abetting a conspiracy even where he neither acts "as a liaison for the parties to the conspiratorial agreement" nor "participat[es] in the original agreement" (Pet. App. A6). The court of appeals also rejected the contention that the use of an aiding and abetting instruction was an impermissible amendment of the indictment (*ibid.*). Finally, the court held that the evidence was in any event sufficient to find petitioner guilty of conspiracy as charged in Count I (*id.* at A8-A9).

Judge Swygert dissented (Pet. App. A12-A28). He argued that the majority's interpretation of the aiding and abetting statute was too broad. He also argued that the district court's statement that it believed the evidence insufficient to support a conspiracy conviction precluded the court of appeals from affirming the conviction.

ARGUMENT

1. a. Petitioner contends (Pet. 7-12) that it is impossible to be guilty of aiding and abetting a conspiracy that has already been formed. As the court of appeals explained in detail in *Galiffa,* 734 F.2d at 309-311, this is simply not so. One is guilty of aiding and abetting if he " 'in some sort associate[s] himself with the venture, * * * participate[s] in it as in something that he wishes to bring about, [and] * * * seek[s] by his action to make it succeed.' " *Nye & Nissen* v. *United States,* 336 U.S. 613, 619 (1949) (quoting *United States* v. *Peoni,* 100 F.2d 401, 402 (2d Cir. 1938)). In cases where a conspiracy exists and a person takes deliberate action to further the object of the conspiracy, he is guilty of the above-described conduct and ought to be liable as an aider and abettor. This is true even though the individual could not be liable as a conspirator in the absence of an express or implied agreement with others to bring about the object offense.

If petitioner's contention were correct, there could be cases in which clearly culpable conduct that Congress sought to make subject to aider and abettor liability would go unpunished. Suppose, for example, that a group of former employees planned to set fire to a business in retaliation for their perceived mistreatment by the employer, and a competitor learned of the plot. If the competitor, for reasons of his own and unbeknownst to the conspirators, were to take some action to assist the plan, such as disabling the nearby fire hydrant, it seems clear that he ought to be guilty of aiding and abetting. Yet he is

not guilty of conspiracy because he did not reach an agreement with anyone else. And if the arson is not consummated, he would not be guilty of aiding and abetting a substantive offense. In that case we submit that he ought to be guilty of aiding and abetting the conspiracy, just as the conspirators would be guilty of conspiracy even though the object was not accomplished. Under petitioner's contention, the competitor would go unpunished for his conduct. See generally *Galiffa,* 734 F.2d at 309-310 & n.7. There is no reason for such an anomalous result, and we are aware of no case reversing an aiding and abetting conviction on the ground that it is impossible to aid and abet an existing conspiracy; on the contrary, the courts have generally indicated that there is no bar to the charge of aiding and abetting an existing conspiracy. See *United States* v. *Walker,* 621 F.2d 163 (5th Cir. 1980), cert. denied, 450 U.S. 1000 (1981); *United States* v. *Alvarez,* 610 F.2d 1250, 1257, aff'd, 625 F.2d 1196 (5th Cir. 1980) (en banc), cert. denied, 451 U.S. 938 (1981); *United States* v. *Lane,* 514 F.2d 22 (9th Cir. 1975).

There can be no doubt that petitioner's conduct here sufficiently associated him with the criminal venture to make him an aider and abettor (see Pet. App. A6-A9). Petitioner obtained more than 3600 pounds of marijuana from the conspiracy in a nine-month period and supplied the conspiracy with more than $1 million and various narcotics; this made him considerably more than a "mere buyer" (see Pet. 12).[1]

---

[1] Because there is also no doubt that petitioner knew of the massive drug distribution conspiracy and every indication that he was part of it, the court of appeals also correctly concluded that the evidence was sufficient to show that he was a member of the conspiracy. Indeed, petitioner does not suggest any theory under which the jury conceivably could have found that petitioner was an aider and abettor, but not a conspirator. Hence, even if petitioner were correct that it is not possible to aid and abet a conspiracy, such an error could not have affected the jury's verdict, and the conspiracy conviction ought to stand. See Point 2, *infra.*

b. For the reasons stated by the court of appeals in *Galiffa* (734 F.2d at 311-312), there is no merit to petitioner's contention (Pet. 12-15) that the trial court impermissibly amended the indictment by charging the jury on an aiding and abetting theory. It is well established that a person indicted as a principal may be convicted on evidence showing that he was an aider and abettor. See, *e.g.*, *United States* v. *Walker*, 621 F.2d at 166; *Levine* v. *United States*, 430 F.2d 641, 643 (7th Cir. 1970) (citing cases), cert. denied, 401 U.S. 949 (1971); *Nye & Nissen* v. *United States*, 168 F.2d 846, 855 (9th Cir. 1948), aff'd, 336 U.S. 613 (1949). The evidence germane to the aiding and abetting charge here was the same as that relevant to the conspiracy charge; there was no unfair surprise and therefore no basis for objecting to the aiding and abetting instruction on the ground that the indictment did not mention 18 U.S.C. 2. See generally *United States* v. *Miller*, No. 83-1750 (Apr. 1, 1985).

2. Petitioner objects (Pet. 15-19) to the court of appeals' alternative holding that his conviction should be affirmed because the evidence was sufficient for the jury to find him guilty of conspiracy. Invoking the Double Jeopardy Clause, petitioner contends that the district judge's statement that he believed that the prosecution's evidence on this point was insufficient forecloses the court of appeals' affirmance on this ground. This contention is without merit.

First, as the court of appeals noted (Pet. App. A8), given that the trial court in fact submitted the case to the jury on instructions that permitted it to find petitioner guilty of conspiracy, there seems little basis for the contention that the court effectively "acquitted" him of the conspiracy charge, as petitioner maintains (Pet. 15). In any event, even if petitioner's premise were correct and the court had "acquitted" him by opining that the evidence was legally insufficient, that would raise no double jeopardy bar to the court of appeals' decision. The essence of

the protection of the Double Jeopardy Clause is the protection against twice being put in jeopardy through successive trials. Here, petitioner is not being subjected to a second trial; the court of appeals has simply affirmed the jury's finding of guilt, and hence the Double Jeopardy Clause is not implicated.

Petitioner's characterization of the trial court's ruling as an acquittal does not insulate it from appellate review; a holding that the evidence is insufficient is a legal ruling that is subject to de novo review as long as it is appealable, *i.e.*, as long as a reversal on appeal would not require further proceedings that would violate the Double Jeopardy Clause.[2] Thus, it is well established that a post-guilty-verdict judgment of acquittal is appealable. *United States* v. *DiFrancesco,* 449 U.S. 117, 130 (1980). Even under petitioner's premise, this case is indistinguishable from such an acquittal; regardless of the trial court's view of the evidence, the jury has entered a guilty verdict that can be reinstated (or, in this case, affirmed) without the need for further proceedings in the trial court. Clearly, this implicates no double jeopardy considerations.[3]

---

[2] The court of appeals did not err in failing to give deference to the trial court's ruling on this legal question or in failing to consider the effect of the court's acquittal of petitioner on Count IV. That acquittal was quite irrelevant to the court's consideration of the conviction on Count I. Even if the two verdicts could not logically be reconciled, there is generally no bar to inconsistent verdicts. *United States* v. *Powell,* No. 83-1307 (Dec. 10, 1984); *Harris* v. *Rivera,* 454 U.S. 339 (1981).

[3] In a case in which further proceedings would be required in the trial court, the question would arise whether they would be barred by the Double Jeopardy Clause. Where the defendant deliberately seeks a mid-trial termination of the trial by the court, further proceedings following a successful government appeal may not violate double jeopardy. *United States* v. *Scott,* 437 U.S. 82 (1978). This principle arguably may extend to a purely legal determination by the court that the evidence is insufficient. See *Commonwealth* v. *Zoller,* 490 A.2d

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

MAURY EPNER
Attorney

NOVEMBER 1985

---

394 (Pa. 1985), cert. granted, *sub nom. Smalis* v. *Pennsylvania,* No. 85-227 (Nov. 4, 1985). Because no new trial or further trial proceedings are required by the judgment in this case, there is no reason to hold it for the decision in *Smalis.*